The Wang Theatre, Inc. d/b/a Citi Performing Arts Center *and* Boston Musicians Association, a/w American Federation of Musicians Local Union No. 9-535, AFL–CIO. Case 01–CA–179293

October 30, 2019

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS MCFERRAN AND KAPLAN

This case is on remand from the United States Court of Appeals for the First Circuit. On January 5, 2016, Charging Party Boston Musicians Association, a/w American Federation of Musicians Local Union No. 9-535, AFL–CIO (the Union) filed a petition in Case 01–RC–166997 seeking to represent a unit of approximately 16 local musicians employed by the Respondent. The Acting Regional Director issued a Decision and Direction of Election on January 28, 2016. Among other things, the Acting Regional Director rejected the Respondent's contention that the petition should be dismissed because the Respondent was not the local musicians' sole employer and had very little control over the local musicians' terms and conditions of employment. The Respondent thereafter filed a request for review, and the Union filed an opposition. On June 3, 2016, the Board denied review in an unpublished order. In the meantime, pursuant to a majority vote in the election, the Union was certified on March 30, 2016, as the exclusive collective-bargaining representative of the local musicians.

The Union thereafter filed an unfair labor practice charge in the instant case, alleging that the Respondent refused to recognize and bargain with the Union in the certified unit in violation of Section 8(a)(5) of the Act. In its answer to the complaint, the Respondent admitted that it refused to recognize the Union. The Board granted a motion for summary judgment on November 10, 2016, ordering the Respondent to recognize and bargain with the Union. *The Wang Theatre, Inc. d/b/a Citi Performing Arts Center*, 364 NLRB No. 146 (2016). On February 14, 2017, the Board denied the Respondent's motion for reconsideration. *The Wang Theatre Inc. d/b/a Citi Performing Arts Center*, 365 NLRB No. 33 (2017). The Board subsequently petitioned the First Circuit for enforcement of its order.

On January 18, 2018, the Deputy Associate General Counsel filed a motion seeking remand of the case "for reconsideration in light of the Board's recent decision" in *Hy-Brand Industrial Contractors, Ltd.*, 365 NLRB No. 156 (2017). The Court granted the motion and remanded the case to the Board on January 31, 2018.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has carefully considered the record[1] in light of the court's remand. For the reasons that follow, we reaffirm our finding that the Respondent has violated Section 8(a)(5) for refusing to recognize and bargain with the Union as the exclusive collective-bargaining representative of the petitioned-for local musicians.

Facts

The Respondent operates the Citi Performing Arts Center[2] in Boston, Massachusetts, which includes a performance venue used for theatrical productions. The Respondent does not produce its own performances, but contracts with other producers to bring theatrical productions to the venue. Depending on the production, the Respondent will act as either lessor or promoter.[3] The producer of the show decides whether it will use live or recorded music, and for productions involving live music, the producer may ask the Respondent to hire local musicians to supplement whatever musicians travel with the production.

The record confirms that the Respondent (or its agent) hires local musicians, and that the local musicians receive their wages and benefits from the Respondent (although the Respondent may be reimbursed for such expenditures). The record also confirms that the local musicians perform under the direction of the producers' conductors, who exert artistic control over the local musicians (i.e., what music is performed and how it is played). The record is otherwise silent as to who controls the local musicians' other terms and conditions of employment, but these terms are ultimately determined by the contract negotiated between the Respondent and a given producer.[4] The Respondent and the Union were once parties to a collective-bargaining relationship covering local musicians, but the last contract between them expired in 2007. The Respondent's sole witness admitted that the Respondent's way of

[1] Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(d); *Frontier Hotel*, 265 NLRB 343 (1982).

[2] We take administrative notice that the venue has since been renamed The Boch Center. See https://www.bochcenter.org/about-us/news/2016/citi-performing-arts-center-to-be-renamed-the-boch-center.

[3] When the Respondent acts as lessor, the producer assumes all expenses and profits from the production; when the Respondent acts as promoter, it advertises the production and shares in costs and revenue.

[4] The record contains several examples of such contracts, but here too they contain little information concerning the terms and conditions of the local musicians, save that the Respondent is responsible for securing their services.

doing business with producers had not changed since 2007.

Discussion

In the underlying representation case, the Board found that the Respondent is an employer of the local musicians within the meaning of Section 2(2) of the Act and the petitioned-for single employer unit is presumptively appropriate under the Act. The Respondent argued, among other things, that the producers are the local musicians' "primary" employers. Provided that the requisite employer-employee relationship exists, however, the Board has long maintained that if a petitioner seeks the employees of an employer, it will not require the naming of all potential joint employers and the litigation of their potential relationship with the named employer. See *Chelmsford Food Discounters*, 143 NLRB 780, 781 (1963). These findings and principles are not implicated by the court's remand, and we therefore decline to reconsider them.

The Respondent has subsequently called into questions whether it has a joint employer relationship with the producers. Based on the foregoing, however, there is also no need to reconsider the case in light of any joint-employer precedent, including the since-vacated *Hy-Brand Industrial Contractors*. *Hy-Brand* purported to overrule the standard for finding joint-employer status set forth in *Browning-Ferris Industries*, 362 NLRB 1599 (2015). Following the court's remand in this case, the Board vacated *Hy-Brand*, as a result of which the overruling of *Browning-Ferris* was of no force or effect. *Hy-Brand Industrial Contractors, Ltd.*, 366 NLRB No. 26 (2018). The Board is currently engaged in rulemaking concerning the proper standard for finding joint employment,[5] but regardless of the applicable standard joint-employer status is simply not relevant here. Unlike the instant case, *Hy-Brand* was an unfair labor practice case in which the General Counsel alleged joint-employer status as part of the complaint, and *Browning-Ferris* involved a petition that named both alleged employing entities as joint employer. Again, under *Chelmsford Food Discounters*, when a petition seeks to bargain with only one employer, there is no need to inquire into the existence of other possible joint employers.[6]

Aside from the fact that no joint-employer precedent has a bearing on this case, our review of the record in the underlying representation case establishes that the Respondent did not raise any joint-employer argument to the Acting Regional Director or to the Board. Rather, the Respondent cited *Browning-Ferris* and other cases implicating joint-employer principles only by way of analogy in service of its argument that the petition should be dismissed because the Respondent is not the *sole* employer of the petitioned-for local musicians. Indeed, the Respondent's Request for Review expressly stated that the Respondent "does not claim that a joint-employer unit is appropriate" and commented that joint-employer status was "entirely irrelevant."[7] Thus, by the Respondent's own admission, no joint-employer argument was placed before the Board in the representation proceeding.[8] To the extent that the Respondent subsequently has asserted that the Board should have engaged in a joint-employer analysis, it accordingly waived the argument by failing to raise it in the representation proceeding.

In sum, no joint-employer argument was properly raised to the Board in the underlying representation proceeding, and even if it had been properly raised, under well-established precedent the existence of potential joint employers is not relevant where, as here, the record establishes that the petitioned-for employer is *an* employer of the petitioned-for employees. As the petitioned-for unit in Case

[5] *The Standard for Determining Joint-Employer Status*, 83 Fed. Reg. 46681 (Sep. 14, 2018).

[6] The Respondent's citation of cases involving situations in which a petitioned-for unit includes employees who are both singly-employed by a user employer and employees who are jointly-employed by the user and a supplier employer are inapposite, as there is no contention here that the petitioned-for unit of local musicians contains both singly- and jointly-employed employees. See *Miller & Anderson*, 364 NLRB No. 39 (2016); *Oakwood Care Center*, 343 NLRB 659 (2004); *M. B. Sturgis, Inc.*, 331 NLRB 1298 (2000); *Greenhoot*, 205 NLRB 250 (1973). Likewise, the Respondent's citation of *Northwestern University*, 362 NLRB 1350 (2015), is unavailing. There, the Board declined to assert jurisdiction over a petitioned-for unit of Northwestern University football players who received grant-in-aid scholarships. Without passing on whether the football players were statutory employees, an issue that the Board found "does not have an obvious answer," the Board held that in light of the control exercised by sports leagues over the individual teams and fact that the overwhelming majority of Northwestern's competitors were public colleges and universities over which the Board cannot assert jurisdiction, it would not promote stability in labor relations to assert jurisdiction in that case. Those circumstances are not present here. Moreover, the Board was emphatic that its reasoning and holding in *Northwestern* was limited to the particular facts of that case. See id. at 1350, 1352, 1355.

Chairman Ring and Member Kaplan agree that *Miller & Anderson*, supra, is distinguishable for the reasons stated above. They do not pass on whether it was correctly decided and would be open to reconsidering it in a future appropriate case.

[7] Further, the Respondent's Request for Review even agreed with the Acting Regional Director's finding that the Respondent had not established the existence of any joint-employer relationship.

[8] For this reason, the Deputy Associate General Counsel's motion for remand incorrectly stated that *Hy-Brand* had "eliminate[d] the basis for the Board's analysis, and rejection, of the [Respondent's] joint-employer defense." The Respondent raised no such defense in the representation case, so the issue was not before the Board. And again, even if the issue had been raised to the Board, denial of review was warranted because, under *Chelmsford Food Discounters*, supra, there is no joint-employer "defense" in these circumstances.

01–RC–166997 was properly certified, the Respondent's refusal to bargain violated Section 8(a)(5) of the Act.

Accordingly, we reaffirm our previous Order in this case.

ORDER

The National Labor Relations Board affirms its Decision and Order issued in this proceeding on November 10, 2016 (reported at 364 NLRB No. 146), and orders that the Respondent, The Wang Theatre, Inc. d/b/a Citi Performing Arts Center, Boston, Massachusetts, its officers, agents, successors, and assigns, shall take the action set forth therein.

Dated, Washington, D.C. October 30, 2019

John F. Ring, Chairman

Lauren McFerran, Member

Marvin E. Kaplan, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD